FILED
SEP 28 1945
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 469

COMPTON-DELEVAN IRRIGATION DISTRICT,
Petitioner,

vs.

MILO W. BEKINS and REED J. BEKINS, as Trustees under the Last Will and Testament of Martin Bekins, Deceased,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to Review the Judgment of the United States Circuit Court of Appeals for the Ninth Circuit.

P. MARCELL BARCELOUX,
Waterland-Breslauer Building, Chico, California,
Attorney for Petitioner.

PETERS AND PETERS,
304 Broadway, Chico, California,
Of Counsel.

FERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes and constitutional provisions involved	3
Specification of errors to be urged	3
Statement	4
Reasons for granting writ	11
Conclusion	16

Table of Authorities Cited

Cases

	Pages
In re Beecher, 4 Fed. (2d) 1001	14
Merced Irrigation District. v. Reed J. Bekins and Milo W. Bekins as executors, 302 U. S. 709, 58 S. Ct. 30	13
Nolander v. Butte Valley Irrigation District, 132 Fed. (2d) 704	2, 11
U. S. v. Bekins, 304 U. S. 27, 58 S. Ct. 811	13
U. S. v. Milo W. Bekins and Reed J. Bekins, as trustees, 58 S. Ct. 647	13
U. S. v. Milo W. Bekins and Reed J. Bekins, as trustees, 304 U. S. 589, 58 S. Ct. 1043	13
Wragg v. Federal Land Bank, 125 Fed. (2d) 1003	3

Statutes

California Stats. 1897, p. 254	3
Judicial Code, Section 240(a) (28 U.S.C., Sec. 347(a))	2
Stats. 1913, p. 778	3
11 U.S.S.A. 301-304 (48 St. 798)	3
11 U.S.C.A. 401-403 (52 St. 940; 50 St. 654)	3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No.

COMPTON-DELEVAN IRRIGATION DISTRICT,
Petitioner,

vs.

MILO W. BEKINS and REED J. BEKINS, as Trustees under the Last Will and Testament of Martin Bekins, Deceased,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to Review the Judgment of the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Compton-Delevan Irrigation District prays that a writ of certiorari issue to review the judgment of the

Circuit Court of Appeals for the Ninth Circuit, entered in the above case on July 17, 1945, reversing the decision of the United States District Court.

OPINIONS BELOW.

The opinion in the District Court. (R. 64-65.) The opinion in the Circuit Court of Appeals (R. 105) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 17, 1945. (R. 105-116.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U.S.C., Sec. 347(a)).

QUESTIONS PRESENTED.

1. Whether the judgment below is inconsistent with the rule invoked by the Circuit Court of Appeals for the Ninth Circuit in *Nolander v. Butte Valley Irrigation District,* 132 Fed. (2d) 704, to the effect that a judgment in bankruptcy under the provisions of the bankruptcy law applicable here, is final, and after the limitation in the final decree as to the time in which bonds might be presented has elapsed, the bondholders are no longer entitled to present their bonds for payment at the composition figure, for the reason that the primary purpose of such pertinent bankruptcy proceedings ending in a final decree, is that the District

shall go forward free in all respects of any liability for the District's obligations, bond or otherwise, other than that of the decree.

2. Whether the judgment contravenes the rule that where there are intervening vested rights of innocent purchasers of land within an irrigation district as to which a final decree in bankruptcy is entered adjudging the district bankrupt and decreeing a composition, a Court of Equity will not entertain a motion to set aside or amend such final decree where to do so will interfere with the intervening vested rights, as such rule is invoked in *Wragg v. Federal Land Bank,* 125 Fed. (2d) 1003.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statutes involved are California Stats. 1897, p. 254 as amended, being the California Irrigation District Act; Stats. 1913, p. 778, the District Securities Commission Act; 11 USCA 301-304 (48 St. 798); 11 USCA 401-403 (52 St. 940) and (50 St. 654) adding Sections 81 to 83 to the Bankruptcy Act of 1898.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

In setting aside the order of the District Court and requiring the District Court to amend its final decree in bankruptcy so as to permit respondents to present

their bonds and receiving payment thereon at the composition figure as fixed by both the interlocutory and final decrees.

STATEMENT.

Petitioner upon December 13, 1941 filed its petition in bankruptcy pursuant to the provisions of Chapter 9 of "An Act to Establish a Uniform System of Bankruptcy Throughout the United States", approved July 1, 1898, as amended. (R. 46.) Upon December 19, 1941, the District Court made its "Order Approving Petition as Properly Filed". The object of the petition was to secure composition of petitioner's outstanding bonded indebtedness, both principal and interest; the District had two issues of bonds, the first being in the sums of $575,000, dated December 1, 1920, each bond being in the principal sum of $1000, bearing interest at the rate of six per cent, maturing at the rate of $1000 each year on the 1st day of each year, from 1927 to 1936, and a second issue totaling $384,000 dated January 1, 1927, known as "first refunding issue", being bonds in the denomination of $1000 each and bearing interest at the rate of six per cent per annum; the District was in default. That at the time of the filing of the petition there was unpaid of the above bonds the principal amount of $103,000 of the first issue and $281,000 of the second or refunding issue. The District Court having approved the petition as properly filed, entered its order "fixing time and place of hearing on petition,

prescribing the form of notice thereof, directing the giving of such notice, and determining the time and manner in which the claims and interests of the creditors may be filed or evidenced". The order provided that notice be given bondholders by publication once a week for three weeks in the Colusa Sun Herald, published in the County of Colusa, State of California, and the Wall Street Journal, published in the City and County of San Francisco, California, and fixing the time of hearing as February 24, 1942 at 10:00 o'clock a. m., and the place of hearing as the courtroom of the District Court located in the Federal Building on "J" Street between 8th and 9th Streets in the City of Sacramento, State of California; the order also fixed the method of creditors presenting their claims, and provided a copy of the notice of time and place of hearing be mailed each bondholder not later than December 22, 1941; said notice was duly published as provided by the order and a copy of the notice was mailed to each bondholder and affidavits thereof filed in the matter. (R. 48.) In pursuance of the notice and of the order, respondents upon January 26, 1942 filed a certified proof or statement of their claim in respect to the bonds involved herein. Upon February 24, 1942, the date set for the hearing, the matter came on for hearing before the District Court, and evidence taken and the matter was submitted and upon March 11, 1942 the Court entered its "Findings of Fact, Conclusions of Law and Interlocutory Decree" approving the plan of composition by which the creditors would receive 20¢ on each

dollar of indebtedness and the R. F. C. was given permission to buy the old bonds of the District for such sum and accept refunding bonds, and naming the Merchants National Bank of Sacramento as the depositing agent of the Court into which bank was to be paid the money for the purchase of the old bonds. The decree provided that notice be given the creditors upon the money being deposited with the disbursing agent, to present their bonds within thirty days for payment and the notice should consist of the clerk giving notice by publication in the Colusa Sun Herald and the Wall Street Journal for two successive issues upon it being reported to the clerk by the disbursing agent that the monies to pay the composition figure on the bonds were available, and further provided that unless the bonds and attached interest coupons were deposited within such thirty days, that the person or persons failing to deposit such bonds and interest coupons would be forever barred from any action to collect same. (R. 50.) Notice by publication as provided in the interlocutory decree was given (R. 51) and affidavits to that effect and to the effect that there was on deposit with the depositary $76,800, sufficient to pay the bondholders in full the composition figure were made and filed. (R. 51.) Upon August 7, 1942 the depositary made its report to the Court disclosing that it expended for the purchase of old bonds $63,160, leaving a balance of $13,640, and that it had deposited such balance with the registry of the Court. *Upon August 17, 1942, petitioner petitioned the Court to enter its final de-*

cree, and upon said date the Court caused to be made its final decree approving all the matters above set forth and found that "due and regular notice had been given" to outstanding bondholders to present their bonds, and further decreed the plan binding upon all creditors of the District, secured or not, or whether they had filed their "verified statement of claim or not", and decreed that old bonds and interest coupons not presented in accordance with the plan, if presented within twelve months from the date of the final decree, be paid, and if not so presented within such time that such bondholders be forever barred from making any claim or demand thereunder, and decreed further that at the end of such one year if there were any outstanding bonds not presented, the monies held by the registrar of the Court should be used by the District to pay off as much as it could of the refunding bonds issued in pursuance of the composition plan. (R. 53.) (Italics ours.) The wording of the decree in this respect is as follows:

> "That upon the expiration of the period of twelve months from the date hereof the clerk of this Court shall forthwith notify the Reconstruction Finance Corporation, by registered letter addressed to it at Washington, D. C., of the amount of funds then remaining in the registry of the Court and that the same are available for the purchase of new bonds of the petitioning District then held by the Reconstruction Finance Corporation, at par and accrued interest; that any new bonds so purchased shall be forthwith cancelled and returned to the petitioning District by

the registrar; that any part of such funds that are not used for such purpose within sixty days after mailing of such notice shall thereupon be paid by the registrar of this Court to and used solely by the petitioning District in the payment of its new bonds and interest thereon; * * *" (R. 36-37.)

On August 24, 1943, a report was made by the registrar of the Court disclosing the amount of old bonds and interest coupons that had been presented and paid, and stated that there remained in the fund the sum of $7040, and that in pursuance of instructions that said sum was used to pay refunding bonds of the District No. 81-86 both inclusive, each for $1000 and bond No. 74 in the sum of $500.00, and in payment of bond No. 1 in the sum of $300.00, leaving a balance on hand of $195.42, which it had returned to the District pursuant to the decree. (R. 53.)

Respondents presented a certified proof of their claim under the bonds held by them, but failed to present their bonds for payment within the thirty days prescribed by the interlocutory decree or within one year from the date of the entry of the final decree, and upon August 18, 1944, a period of over one year after the limitation in the final decree for the presentation of bonds and payment had expired, filed a motion to modify the final decree and to extend the time thereof for the deposit of their bonds, and, if necessary for that purpose, to relieve movents from their default, if any therein, and to grant them the right to appear and claim the payment provided by the plan

of composition despite the provisions of the final decree, to which petition was annexed a statement and an affidavit of Reed J. Bekins, and movents' authorities. (R. 38-45.) The affidavit of Reed J. Bekins was to the effect that he and his brother Milo W. Bekins were trustees under the will of Martin Bekins, deceased, and a part of the property owned by the trust were the bonds involved. That Reed J. Bekins conducted the business of the trust in reference to said bonds and that he became ill and unable to attend to his business affairs or the affairs of the trusteeship and neglected on account of his illness and inability to attend to business, to attend the hearing noticed for February 24, 1942, and/or to deposit his bonds. (R. 42.)

In opposition to the motion and affidavit of Reed J. Bekins, Jerome D. Peters made and caused to be filed his affidavit upon September 8, 1944. (R. 45-61.) Such opposing affidavit sets forth in chronological order the different proceedings in the matter as set forth hereinbefore, but in addition sets forth that the petitioner is not in a position to pay the composition figure, as the money that was advanced for such purpose was used as provided by the final decree to pay certain refunding bonds, and that since the entry of said final decree the position of the petitioning District has completely changed; that there had been excluded from the District a great number of acres, there originally being 12,652 acres and there now being 6047 acres. That the personnel of the officers of the District has changed and there are no directors

who were directors at the time of the composition proceedings; that all the officers of the District are new officers and no one of them was acting in any official capacity at the time of the proceeding; that the attorneys for the District have changed.

Thereafter and upon September 11, 1944, W. Coburn Cook, attorney for respondent, filed his affidavit in response to the affidavit of Jerome D. Peters. (R. 61-64) relating to the illness of Reed J. Bekins and the conduct of the Bekins trust.

The motion came on regularly to be heard before the District Court, the Honorable Martin I. Welsh, district judge, presiding, and upon September 19, 1944, the Court made and caused to be entered an order denying the motion, assigning no grounds therefor. (R. 64-65.) Notice of appeal by respondents was duly served and filed October 14, 1944. The matter came before the U. S. Circuit Court of Appeals for the Ninth Circuit upon the 14th day of May, 1945, and upon the 17th day of July, 1945, the Court entered its decision setting aside the order of the District Court and requiring the District Court to grant the motion and permit the filing of the bonds. (R. 105-116.) Petitioner filed a petition for rehearing before the Appellate Court, and this was denied on the 20th day of August, 1945. (R. 118.) This petition for a writ of certiorari is for the purpose of having reviewed the decision and judgment of the Appellate Court.

REASONS FOR GRANTING WRIT.

I.

The decision of the Appellate Court decrees that the lower Court set aside the final decree in bankruptcy for the purpose of permitting respondents to file their bonds and claim and receive the composition figure ordered in the decree. The final decree as set forth in the statement above decreed that all outstanding bonds be presented for payment within one year from the date of the final decree. The final decree was dated August 17, 1942, and the motion to amend said decree was not filed until August 18, 1944. Thus not only had the time decreed by the final decree elapsed, but in addition one year thereafter had also elapsed before the motion was filed; no appeal was taken from the judgment of the District Court, nor was any writ of certiorari petitioned for. The question here under consideration is whether a bondholder who fails to present his bonds for payment within the time decreed in the final decree of the District Court, may, after such time has elapsed and an additional one year has elapsed, petition successfully the District Court to have the decree amended in such manner that he may still present his bonds and claim the composition amount.

The Appellate Court as to whose decision we are seeking a writ of certiorari, in *Nolander v. Butte Valley Irrigation District,* 132 Fed. (2d) 704, decided contrary to its decision in the instant matter, therein holding that where a final decree in bankruptcy is rendered wherein substantially it is decreed

that the plan is binding on all creditors of the District, secured or not, or whether they had filed their verified statement of claim or not, and further decreed that old bonds and interest coupons not presented in accordance with the plan, which might be presented within twelve months from the date of the decree be paid and if not so presented within such twelve months that such bondholders be forever barred from making any claim or demand thereunder, *that the right to present bonds and receive the composition figure expires at the time decreed for the reason that the primary purpose of the pertinent bankruptcy provisions is that the District shall go forward free in all respects of any liability for the District's obligations, bond or otherwise, other than that of the decree.* (Italics ours.)

The Appellate Court in its decision in the instant case stated that the respondent did not have any notice of the entry of the final decree or of its provisions. The decree expressly sets forth that "due and regular notice had been given"; the record discloses that due and regular notice was given.

The Appellate Court states that the money represented in the composition figure which would have been paid to the respondents if their bonds had been presented is really the property of the respondents and not of the petitioner; this is an erroneous conclusion. Such monies could and would have been respondents' if they had performed under the final decree; they neglected to do so. Respondents filed their claim under their bonds, but neglected to present their

bonds for payment. They attribute this to illness of one of their number, namely, Reed J. Bekins. However there was another trustee, namely, Milo W. Bekins; no reason is given why Milo W. Bekins did not present the bonds in behalf of the trusteeship, other than that Reed J. Bekins conducted the trust's business in regard to these bonds. We know of no legal right for one trustee to delegate the business of a trust to another. It cannot be assumed in view of the record before this Court that the Bekins are unfamiliar with bankruptcy law, for their names appear in many proceedings relating to the law under discussion. The respondents involved here are Milo W. Bekins and Reed J. Bekins, as trustees under the will of Martin Bekins, deceased. They have appeared before this Court in the following cases in bankruptcy law, namely, *U. S. v. Bekins,* 304 U. S. 27, 58 S. Ct. 811; *U. S. v. Milo W. Bekins and Reed J. Bekins, as trustees,* 58 S. Ct. 647; *Merced Irrigation District v. Reed J. Bekins and Milo W. Bekins as executors,* 302 U. S. 709, 58 S. Ct. 30; *U. S. v. Milo W. Bekins and Reed J. Bekins as trustees,* 304 U. S. 589, 58 S. Ct. 1043. In at least one of the foregoing matters they were represented by Mr. W. Coburn Cook, Esq., who appears for them in the present proceeding. Mr. Cook prepared respondents proof of claim herein; however, his affidavit herein discloses that he was employed for that purpose only and not to prosecute the collection of the same. However, the Bekins were fully familiar with the provisions of the bankruptcy act in question and their failure to present their bonds within the year is inexcusable.

Further, the respondents' motion came one year and one day after the expiration of the one year period of limitation fixed in the final decree for the presentation of bonds. There are cases in equity wherein, in the event of excusable neglect, where a motion is made seasonably, judgments have been opened. It is suggested that the time taken by respondents to file their motion is not reasonable and under the principles of law many times invoked, the delay is inexcusable. *In re Beecher,* 4 Fed. (2d) 1001, the Court stated that the discretionary powers of the lower Court to revise its decree "should not be used to condone negligence or encourage sloth." The affidavit of W. Coburn Cook in reference to the illness of Reed J. Bekins states in effect that upon his own observation and occasional visitations at the home of Reed J. Bekins in Burlingame, that the said Reed J. Bekins only occasionally goes into the office of Bekins Van and Storage Company of San Francisco, of which he is an official, and that he does not regularly attend to business, but remains in his home in Burlingame, and has not recovered from his illness. This affidavit in and of itself should defeat the motion. If Mr. Reed J. Bekins goes to his office in San Francisco, if only occasionally, he goes to attend to business. The statement that Reed J. Bekins does not regularly attend to his business is an admission that at times he does attend to business and certainly it would have required no effort to have ascertained the time in which bonds in the instant case could have been presented and to have presented them. The Bekins Van and Storage

Company of San Francisco is a well known national concern and it is a matter of common knowledge that of necessity they employ considerable help; under instructions from Reed J. Bekins or Milo W. Bekins any employee of the company could have ascertained the status of the proceedings in bankruptcy and mailed or personally taken the bonds for presentation and payment. (R. 64.)

II.

Intervening rights have accrued and become vested in reliance upon the finality of the final decree.

The affidavit of Jerome D. Peters discloses the acreage of the District has changed substantially since the composition proceedings; at that time the District embraced 12,652 acres and now embraces 6047. None of the directors of the District at present were directors at the time of the composition; the attorneys have changed; the Court knows as a matter of common knowledge that in the interim since the final decree lands have been sold; all had the right to rely on the finality of the final decree. In conformity with that decree, certain bonds of the District (refinancing) were paid with the money remaining which had been available for the payment of the bonds which were not presented. The record discloses the bonds so paid to have been Nos. 81-86, both inclusive, for the sum of $1000 each, bond No. 74 for the sum of $500, and bond No. 1 for the sum of $300. The Court may take judicial notice that the bond No. 1 would be the first to be paid, and bonds Nos. 74, 81-86 would not

be due and payable until the far distant future; if the decision of the Appellate Court remains, the District will not only have to assess for current bonds and interest coming due, but also for sufficient money with which to pay the bonds so retired under the order of the Court and which bonds in the usual course of events would not have to be paid until some distant date. Thus the land owners in the District, and those who have purchased land, relying on the finality of the decree, will be injured. Each of these have acquired intervening rights relying on the decree which will be interfered with if the opinion of the Appellate Court stands.

CONCLUSION.

It is submitted that a writ of certiorari should be granted, the decree of the Court below reversed, and it be ordered that the order of the District Court stand.

Dated, Chico, California,
September 24, 1945.

P. MARCELL BARCELOUX,
Attorney for Petitioner.

PETERS AND PETERS,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of September, 1945.*

.....

Attorney for Respondents.

Office - Supreme Court, U.S.
FILED
NOV 14 1945
CHARLES ELMORE CROPLEY
CLERK

(15)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1945

No. 469

COMPTON-DELEVAN IRRIGATION DISTRICT,
Petitioner,

vs.

MILO W. BEKINS and REED J. BEKINS, as Trustees under the Last Will and Testament of Martin Bekins, Deceased,
Respondents.

RESPONDENTS' REPLY TO PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

W. COBURN COOK,
Berg Building, Turlock, California,
Attorney for Respondents.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Statement of the Case	2
Argument	6
I. There was no error in the decree requiring that the moneys belonging to the respondents be paid to them, although more than a year had elapsed since the entry of the final decree, from which no appeal had been taken	6
II. There are no intervening vested rights	10
Conclusion	10

Table of Authorities Cited

Cases

	Page
Decatur Bank v. St. Louis Bank, 21 Wall. 294	8
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U. S. 238, 64 S. Ct. 997	8
Nolander v. Butte Valley Irrigation District, 132 Fed. (2d) 704	8
Pickford v. Talbot, 225 U. S. 651, 32 S. Ct. 687	8
Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382	9
Wright v. Board of Public Instruction, 142 Fed. (2d) 577	9

Statutes

Bankruptcy Act, Section 386	9
Bankruptcy Act, Chapters X, XII and XIII, Sections 119, 413 (3) and 616 (2)	9
Title 11, U. S. C. A., Section 403 (b)	2

Texts

Collier, 14 Ed., Vol. 8, p. 176, n. 1	9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 469

COMPTON-DELEVAN IRRIGATION DISTRICT,
Petitioner,

vs.

MILO W. BEKINS and REED J. BEKINS, as Trustees under the Last Will and Testament of Martin Bekins, Deceased,
Respondents.

RESPONDENTS' REPLY TO PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Milo W. Bekins and Reed J. Bekins as trustees under the last will and testament of Martin Bekins, deceased, respondents, reply to the petition for writ of certiorari in the above entitled matter and pray that said petition be denied.

STATEMENT OF THE CASE.[1]

The pertinent facts of the case are well stated in the opinion of the court below. (R. 105.) (150 F. (2d) 526.)

Certain additional facts pertaining to the case should be stated as follows:

Title 11, U. S. C. A., Sec. 403 (b), provides:

> "Upon approving the petition as properly filed, or at any time thereafter, the judge shall enter an order fixing a time and place for a hearing on the petition, which shall be held within ninety days from the date of said order, and shall provide in the order that notice shall be given to creditors of the filing of the petition and its approval as being properly filed, and of the time and place for the hearing. The judge shall prescribe the form of the notice which shall specify the manner in which claims and interests of creditors shall be filed or evidenced, on or before the date fixed for the hearing."

---

[1]Throughout this reply the Compton-Delevan Irrigation District will be referred to as the "district".

The district judge, upon the filing of the bankruptcy petition, made an order fixing the time and place of the hearing on the petition and prescribed the form of notice. (R. 17.)

The notice, the form of which was embodied in this order, contained the following requirements relative to filing claims:

> "Notice is further given that the claims and interests of creditors of said Compton-Delevan Irrigation District shall be filed or evidenced herein on or before said 14th day of February 1942 in the following manner:
>
> Each such creditor shall file with the Clerk of this Court a verified statement of the claim or interest of such creditor, bearing the title of this matter and setting forth the nature and amount of such claim or interest.
>
> If such claim or interest is evidenced by a bond or bonds issued by said petitioner and interest coupons appertaining to such bond or bonds, the bond or bonds held or owned by the creditor shall be described by giving designation of the issue to which said bond or bonds belong, their respective serial numbers, and principal amounts, their maturity date, and the numbers of any interest coupons which appertain to the respective bonds."

Pursuant to this notice the respondents properly filed their claim as required by the order on January 26, 1942. (R. 22.) Respondents assumed that they had done all that was required. They had filed their claim as provided by the court's order. It was assumed that in due course they would receive the distribution provided by the plan of composition.

The order determining the manner in which claims should be evidenced and filed did not require anything whatever as to deposit of the bonds, but merely required the making of a verified claim by the creditor.

Respondents did not appear at the hearing nor did they contest the petition for the confirmation of the composition.

An interlocutory decree was entered confirming the plan of composition. The interlocutory decree for the first time made a different provision as to the manner of evidencing claims, for it required that "the holders of said bonds be and they are hereby required to deposit said bonds, with unpaid interest coupons attached, with the disbursing agent before payment is made as herein provided; * * *" (R. 28.)

It will be observed, however, that the decree did not say that creditors were barred from asserting any claim against the funds, but merely that they would be barred from asserting any claim against the district should they fail to deposit their bonds. (R. 29, 30.)

On August 17, 1942, the final decree was obtained. (R. 38.) The final decree for the first time contained the provision that creditors would be barred from participating in the funds if they did not deposit their bonds within a twelve-month period (the interlocutory decree had fixed a thirty-day period). (R. 36.)

Respondents failed to present their bonds. The record is clear that they had no direct or other knowledge of the provisions of the interlocutory or final decree

relating to the time limit on depositing bonds. Eventually ascertaining their situation they presented to the court (R. 38) the motion which is the subject of this contest for an order for payment of their claim, and requested that if necessary the final decree be modified to extend the time so as to relieve them from any default that there might be. (R. 38.) Amongst other things, the showing made was that Reed J. Bekins and Milo W. Bekins are trustees appointed by the will of Martin Bekins, deceased; that Reed J. Bekins became ill shortly after the bankruptcy petition was filed, and was unable to attend to business affairs. He failed on account of his illness to seek relief sooner.

Respondent contended however that the deposit of the bonds was an unnecessary requirement inasmuch as they had already filed their claim. (R. 42.) The time for depositing the bonds as provided in the final decree had expired on August 17, 1943. The request to the court for relief was not made until August 18, 1944.

By the counter-affidavit in opposition to the motion (R. 45), a great deal of extraneous matter was brought into the record, and is argued in the petition for writ of certiorari. (R. 49.) From this extraneous matter petitioner seeks the inference that because the undersigned counsel had been attorney for the Bekins' interest in other cases, and in this case had filed claims for other parties, some sort of notice was imputed to the respondents. Petitioner even goes to the extreme length of urging in its petition (page 13 of Petition for Writ of Certiorari herein) that because the Bekins trustees have appeared before this court in other bank-

ruptcy proceedings, and because the undersigned counsel has represented them in some of these matters that the Bekins were fully familiar with the bankruptcy act, and therefore their failure to present their bonds within the year is "inexcusable". This line of argument hardly seems to require even the dignity of a reference, let alone a reply, and none is made.

Other extraneous matter, and which is made the subject of one of its points for reversal and granting of the writ, pertains to the so-called "intervening" rights. The court below in its opinion states bluntly that the record discloses no vested intervening rights. (R. 116.) This is correct. The only so-called intervening rights alluded to in the record are those claimed by the counter-affidavit of Mr. Jerome D. Peters. (R. 45.) Respondents submit that vested rights cannot be so shown nor become matters of record in the case by means of a counter-affidavit addressed to a motion after trial. No parties appeared in the cause claiming such rights nor do they now appear to assert such claimed rights.

ARGUMENT.

I. THERE WAS NO ERROR IN THE DECREE REQUIRING THAT THE MONEYS BELONGING TO THE RESPONDENTS BE PAID TO THEM, ALTHOUGH MORE THAN A YEAR HAD ELAPSED SINCE THE ENTRY OF THE FINAL DECREE, FROM WHICH NO APPEAL HAD BEEN TAKEN.

The decision of the court below may be supported on many grounds. In the first place, the composition moneys belonged to the respondents and not to the petitioner herein. As has been pointed out, the re-

spondents filed their claim as provided by the court's order. This order has never been modified nor changed. The claim entitled the respondents to payment without anything further. There is nothing in the municipal bankruptcy act which would appear to require the surrender of the evidence of the debt. As the court's order was made pursuant to the statute and as the claim was filed pursuant to the order, respondents were entitled to payment. They did not know that any further orders were made in the matter. They were not represented by counsel in the case. What the Circuit Court has done is merely to order that despite the terms of the final decree, the moneys which belonged to the respondents be paid to them.

Secondly, the petitioner has no standing in the matter; it is and should be unaffected by the disposition of those moneys. In all justice the decree should have provided that forfeited money should be paid to other creditors, but not being paid to other creditors they could not become the property of the bankrupt.

Thirdly, the motion was not an appeal from the final decree; it was merely a request to the court having jurisdiction that the intention of the proceeding be carried out and the moneys paid to the respondents, despite the terms of the final decree.

Fourthly, the provision of the final decree which limits to a period of one year the right of a creditor to be paid where he has filed a claim, and requires him to do something other than that required by the previous order, should be considered null and void. There is no conflict between the decision in this case and in

the case of *Nolander v. Butte Valley Irrigation District,* 132 Fed. (2d) 704. In that case the court in its opinion stated:

> "At the hearing it became evident that the appellant was not prejudiced, and she has no further standing here to make the contention."

Citing *Decatur Bank v. St. Louis Bank,* 21 Wall. 294, 301. But in the instant case the creditor is hurt by the order because the year has gone by. There is no conflict between the *Nolander* case and the present case.

Lastly, in the case of *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U. S. 238, 64 S. Ct. 997, the Supreme Court of the United States reviews the principles relating to relief from judgment. Here the court, many years after the entry of the decision in 1932 permits the reopening of the case by a bill to review in the Circuit Court of Appeals. The court declared that the federal courts long ago established the general rule that they would not alter nor set aside their judgments after the expiration of the term, but from the beginning it is declared there has existed alongside the term rule a rule of equity in effect that under certain circumstances relief will be granted against judgments, regardless of the term of their entry. Where the occasion has demanded and where the enforcement of the judgment is "manifestly unconscionable", the court will exercise this power. (*Pickford v. Talbot,* 225 U. S. 651, 32 S. Ct. 687, 689.) Customarily this has been accomplished by bills of review, bills in the nature of bills of review, or by original proceeding to enjoin enforcement of the judgment, and the relief granted has taken several different

forms, setting aside the judgment to permit a new trial, altering the terms of judgment, restraining the beneficiary of the judgment from taking any benefit.

It seems elemental that if the relief is justified the form should cut no figure.

See also

Wright v. Board of Public Instruction, 142 Fed. (2d) 577;

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382.

We respectfully suggest also that whereas time limits are prescribed by various sections of the bankruptcy act setting aside or modifying an arrangement or other settlement or order (e.g. Bankruptcy Act, Sec. 386), it would appear that there is no specific time limit fixed within which a decree may or may not be modified under the provisions of Chapter IX of the Bankruptcy Act.

Under Chapter XI the power is expressly conferred to extend any time limit upon cause shown. (See 313 (3), Bankruptcy Act.) The same power is conferred under Chapters X, XII and XIII, by Sections 119, 413(3) and 616(2). (Collier, 14 Ed., Vol. 8, p. 176, n. 1.) Chapter IX is silent both upon the power to fix the time limit in question or to extend it. But one thing the statute does prescribe is that "The judge shall prescribe the form of the notice, which shall specify the manner in which claims and interests of creditors shall be filed or evidenced, on or before the date fixed for the hearing." This he did, and the appellants fully complied with the order.

II. THERE ARE NO INTERVENING VESTED RIGHTS.

As shown above the only claimed vested intervening rights are those referred to in the affidavit of Jerome D. Peters. Such rights are not thus made a part of the record, nor are the parties interested parties. They have no standing in the case.

But further than that, the rights which are claimed are not intervening vested rights. The only intervening vested rights are those which would pertain to these funds. If these funds had been allotted to other creditors, then there would be intervening rights. Here the bankrupt cannot claim them. They do not belong to the bankrupt. The bankrupt is simply not concerned. The landowners are not parties to the proceedings nor do they attempt to intervene, nor have they acquired any rights in the funds.

CONCLUSION.

It is respectfully submitted that the petition be denied.

Dated, Turlock, California,
November 9, 1945.

Respectfully submitted,
W. COBURN COOK,
Attorney for Respondents.